COA NO. 48119-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JONATHAN DUENAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES

Page

A. ARGUMENT IN REPLY

1. THE MOTHER'S TESTIMONY THAT HER DAUGHTERS WOULD NOT LIE ABOUT BEING SEXUALLY ABUSED CONSTITUTED AN IMPERMISSIBLE OPINION ON CREDIBILITY AND GUILT, AND THE PROSECUTOR COMMITTED MISCONDUCT IN ELICITING THIS OPINION.

a. This issue can be raised for the first time on appeal as manifest constitutional error.

The State claims the error cannot be reviewed under RAP 2.5(a)(3). Brief of Respondent (BOR) at 9-12. The State is wrong.

RAP 2.5(a)(3) serves a gate keeping function. State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). A constitutional error that was not objected to below will be reviewed if "there is a fairly strong likelihood that serious constitutional error occurred." Lamar, 180 Wn.2d at 583. Constitutional errors are treated special because they often result in serious injustice to the accused. State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). "Such errors also require appellate court attention because they may adversely affect the public's perception of the fairness and integrity of judicial proceedings." Scott, 110 Wn.2d at 687.

"For a claim of error to qualify as a claim of manifest error affecting a constitutional right, the defendant must identify the constitutional error and show that it actually affected his or her rights at trial. The defendant must make a plausible showing that the error resulted

in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial." Lamar, 180 Wn.2d at 583.

Opinion testimony on a defendant's guilt and the credibility of a witness is an error of constitutional magnitude because such testimony invades the province of the jury and violates the right to a jury trial. State v. Quaale, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); State v. Montgomery, 163 Wn.2d 577, 590-91, 183 P.3d 267 (2008). The State does not, and cannot, claim otherwise.

Rather, the State contends the opinion testimony error at issue is not manifest. BOR at 10. "'Manifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim." State v. Kirkman, 159 Wn.2d 918, 936, 155 P.3d 125 (2007). The testimony Duenas challenges is not merely a "nearly" explicit statement that Linden believed her accusing daughters — it is an explicit statement she did. The prosecutor asked if her daughters would lie about "smaller stuff or would it be about *a massive issue like this*?" RP 159. In context, the question is clearly geared toward seeking an opinion about whether her daughters would lie about the sexual abuse allegations they made against Duenas. There is no other "massive issue like this" involved. Linden responded "I think it would be smaller -- I -- *something like this is* not something that's just made up or something that they're going to lie about."

RP 159-60. Based on her answer, it was perfectly clear to Linden what the prosecutor was talking about. The issue at trial was whether the children's accusations were believable, such that the State proved its case beyond a reasonable doubt. That was the "something like this" referred to in both the question and the answer. Linden's opinion that she believed her accusing daughters is unmistakable.

In the general written instructions, the jury was instructed it was the sole judge of the credibility of witnesses. CP 20. This instruction, which is part of a larger pattern instruction, is given in every single criminal case. The presence of a boilerplate instruction is not a talisman that renders all improper opinion errors automatically unreviewable under RAP 2.5(a)(3). This is especially true where the witness giving the opinion is the mother of the children in a case involving sex abuse charges. See State v. Jerrels, 83 Wn. App. 503, 508, 925 P.2d 209 (1996) ("A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so."), review denied, 136 Wn.2d 1011, 966 P.2d 903 (1998).

The State points out, as did Kirkman, that judicial comments on the evidence can be cured by instruction and so, by extension, can impermissible opinions on credibility. BOA at 11 (citing State v. Ciskie, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988)). But this is not invariably so.

Some judicial comments are incurable even when the jury is told to disregard them. See State v. Becker, 132 Wn.2d 54, 65, 78, 935 P.2d 1321 (1997) (other instructions did not cure judicial comment on evidence, one of which was the boilerplate instruction about disregarding judicial comments). There is no absolute rule. Prejudice must be assessed case-by-case. And in Duenas's case, unlike in the judicial comment cases, the jury was never instructed anywhere *to disregard* the improper opinion testimony. The boilerplate instruction informed jurors they were the sole judges of credibility, but did not inform them they were forbidden from taking Linden's opinion into account in determining whether the children's accusations should be believed. CP 20.

The State cites Kirkman in support of its position that there is no actual prejudice, but Kirkman did not hold the opinion testimony at issue in that case was an explicit or nearly explicit opinion that the witness believed the accusing victim. Kirkman otherwise makes clear that if there is such an opinion, the error is manifest. Kirkman, 159 Wn.2d at 936, 938; accord State v. King, 167 Wn.2d 324, 332, 219 P.3d 642 (2009). "Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow." Kirkman, 159 Wn.2d at 936.

The error in Duenas's case is manifest from the record. To determine whether statements are impermissible opinion testimony in light of the manifest error standard, a court will consider the circumstances of each case, including, (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. King, 167 Wn.2d at 332-33.

The witness here is the children's own mother, which this Court has recognized is capable of conveying a particularly problematic form of opinion testimony by virtue of her parental status. State v. Sutherby, 138 Wn. App. 609, 617-18, 158 P.3d 91 (2007), aff'd, 165 Wn.2d 870, 204 P.3d 916 (2009); Jerrels, 83 Wn. App. at 508. The nature of the testimony has already been addressed: it was an explicit opinion that her daughters were telling the truth about the allegations in this case, which in turn amounted to opining Duenas was guilty. The charges here involve allegations of sexual abuse against children with no eyewitnesses. In that circumstance, the jury could especially be expected to give weight to the opinion of the person who is expected to know the children best: their mother. Duenas's defense was that he didn't commit the abuse. As for other evidence, this is a "he said she said" type of case. For this reason, credibility of the complaining witnesses was the crucial issue in the case.

Sutherby, 138 Wn. App. at 617. Considering these circumstances, the improper opinion testimony is an error of constitutional magnitude that can be raised for the first time on appeal. The actual prejudice is that the mother's opinion impermissibly bolstered the credibility of her daughters' accusations in a case that turned on their credibility.

b. The mother's testimony that she did not believe her daughters were lying invaded the province of the jury, and defense counsel did not open the door to this constitutional error.

The State argues there is no error because Duenas's attorney opened the door to Linden's opinion testimony. BOR at 12-16.

The State fails to recognize that the "opening the door" doctrine, pertaining as it does to the admissibility of evidence, "must give way to constitutional concerns such as the right to a fair trial." State v. Jones, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). For this reason alone, the State's proffered "open door" theory does not absolve the prosecutor of the improper opinion testimony he elicited. Linden's opinion that her children were not lying about Duenas abusing them strikes at the heart of a fair trial by jury. Sutherby, 138 Wn. App. at 617-18; Jerrels, 83 Wn. App. at 508.

Even if constitutional concerns did not control, the open door doctrine still does not apply because counsel did not elicit inadmissible testimony from Linden on cross-examination. "[W]hen a party opens up a

subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced." State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). However, the "open door" rule "applies only when the opposing party has first introduced inadmissible evidence." Patterson v. Kennewick Public Hosp. Dist. No. 1, 57 Wn. App. 739, 744, 790 P.2d 195 (1990); see also Piel v. City of Federal Way, noted at 194 Wn. App. 1002, 2016 WL 2870674 at *6 n.9 (2016) (open door doctrine "involves the introduction of inadmissible evidence, not admissible evidence") (unpublished), review denied, 186 Wn.2d 1015, 380 P.3d 495 (2016).

If a party "opens the door" with *admissible* evidence by being the first to raise a subject matter at trial, that party invites the opposing party to explain, clarify or contradict its evidence, but "does not waive all objections to any evidence its adversary offers in response." Lakoda, Inc. v. OMH Proscreen USA, Inc., noted at __Wn. App.__, 2016 WL 4727421, at *7 (slip op. filed Sept. 8, 2016) (unpublished). "In other words, if a party simply introduces evidence that is admissible, albeit damaging to the opponent's case, introduction of the evidence does not open the door to rebuttal by inadmissible evidence. If the introduction of admissible evidence opened the door to rebuttal by inadmissible evidence, the rules of

evidence would be rendered virtually useless." 5 K. Tegland, Evidence Law and Practice § 103.15 at 78-79 (5th ed. 2007).

Here, defense counsel on cross-examination sought Linden's agreement that her children "lied on occasion." 1RP 158. Counsel did not ask whether her children lied about the allegations in this case. Linden answered her children lied "every once in a while." RP 158. The State has addressed admissibility under ER 608 and has not argued the mother's answer to defense counsel's question was inadmissible. Defense counsel did not open the door to inadmissible opinion testimony elicited by the State on redirect by eliciting admissible testimony on cross-examination.

The open door doctrine is inapplicable for another reason. The doctrine prevents one party from painting a false picture to the jury. State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002). Simply eliciting the mother's testimony that her children were known to lie on occasion does not mislead the jury such that the prosecutor was permitted to ask whether her children were lying regarding the charged incidents. In responding, the prosecutor could have asked if her children would lie about small or big things generally without tying Linden's answer to the accusations in this case. The prosecutor crossed the line. The State acknowledges a prosecutor may not ask a witness if she believes the victims are telling the truth about the charged incidents, but insists that did not happen here.

BOR at 16-17. According to the State, the prosecutor merely clarified the extent of the children's lying to rebut the defense attempt to portray the children as general liars. BOR at 17. Duenas disagrees. As argued, the record shows the prosecutor, in asking whether her children would lie "about a massive issue like this," elicited Linden's opinion about whether her children were lying in relation to the charged incidents. RP 159. That is constitutional error.

c. The prosecutor committed misconduct in eliciting the improper opinion testimony.

The State suggests there is no prosecutorial misconduct because defense counsel opened the door to the State's redirect examination of Linden. BOR at 22. That argument fails. A defendant "can 'open the door' to testimony on a particular subject matter, but he does so under the rules of evidence. A defendant has no power to 'open the door' to prosecutorial misconduct." Jones, 144 Wn. App. at 295. The State stakes its claim on the idea that the prosecutor did not commit misconduct because he did not elicit any improper testimony. BOR at 21-22. The record shows otherwise. Under Jerrels, the prosecutor's deliberate elicitation of Linden's opinion that her children were not lying about being abused deprived Duenas of his right to a fair trial. Jerrels, 83 Wn. App. at 504, 507-08.

d. Alternatively, defense counsel was ineffective in failing to object to the mother's improper opinion testimony and misconduct in eliciting the testimony.

The State argues defense counsel was not ineffective in failing to object to the improper opinion testimony because opening the door to it was a legitimate strategy. BOR at 19-20. The State focuses on the wrong thing. Defense counsel's question on cross-examination was a legitimate tactic, but that does not answer the question of whether, from an objectively reasonable standpoint, competent counsel would have objected to what the State elicited in response. Duenas received no benefit from the mother's impermissible opinion testimony. On the contrary, the mother's improper testimony damaged Duenas's defense in a case that turned on the credibility of the children, just as it damaged the defense in Sutherby and Jerrels.

The State maintains an objection would not have been sustained because the door was opened. BOR at 17. Duenas has argued the door was not opened. But assuming for the sake of argument it was, an objection was still called for. Even where the defendant has opened the door to a particular subject, the trial court may still exclude unduly prejudicial evidence elicited in response under ER 403. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). Questions asking whether another witness is "lying or not telling the truth are improper and

constitute misconduct because they are designed to elicit testimony which is both irrelevant and prejudicial." State v. Wright, 76 Wn. App. 811, 825, 888 P.2d 1214 (1995). The opinion testimony elicited by the State compromised Duenas's constitutional right to a fair jury trial. Linden's opinion testimony that her children were telling the truth in this case had no legal relevance, but it was extremely prejudicial because of the weight a jury could be expected to put on a mother's opinion in a case involving the alleged sexual abuse of her children. Sutherby, 138 Wn. at 617-18; Jerrels, 83 Wn. App. at 507-08. Defense counsel should have objected.

2. COUNSEL'S FAILURE TO RENEW HIS CHILD HEARSAY OBJECTION FOLLOWING TRIAL TESTIMONY THAT WAS INCONSISTENT WITH TESTIMONY FROM THE PRE-TRIAL HEARING CONSTITUTES INEFFECTIVE ASSISTANCE.

Linden testified on direct examination that she elicited HA's allegation in the following manner: her sister had "already said some things, and *I just want to make sure that they're true. . . . [K.] told me that J.D. had been touching you. . . . Is that true?* . . . Is there anything you want to tell me?" RP 128. This contradicted her pre-trial testimony that she did not ask any leading question in obtaining the allegation. RP 35-36.

The State contends defense counsel was not ineffective in failing to renew a child hearsay objection because Linden's contradictory trial

testimony was a "misstatement." BOR at 27. The State points to what Linden later testified to on cross-examination:

> [Linden]: So I wasn't, like, just -- I didn't, like, go into, Well, this is what I heard and this is what was done, and blah, blah, blah. It was nothing like that. I was, like, you know, Is there something that you should tell me? I -- you know, I'm your mom. You know, if anybody ever did anything or -- I was, like, that. And I said, Well, let me make this easy for you because your sister has already told me some things that I think is really important that you should probably let me know.
> Q. Did you tell her --
> A. I believe -- if I remember correctly, I believe I asked her like, Well, is there something you would like to tell me or -- I can't remember along the lines of what I said at the moment. I mean, it's -- yeah.
> Q. Okay. I think your statement was previously with the State that you told [HA] that [KL] had told you that --
> A. [KL] has already told me something that I think is important for you to tell me.
> Q. -- you had been inappropriately touched. And she said, Touched down there.
> A. I didn't say inappropriately touched.
> Q. Okay. What do you think you might have said?
> A. I believe I said, [KL] had told me something. I don't rem- -- I can't tell you exactly what I said at the moment. I mean, it is such a mess. Like half the stuff I remember is blocked out. I mean --

RP 163-64.

Contrary to the State's suggestion, Linden did not repudiate what she testified to on direct examination regarding how she elicited HA's allegation. Linden took issue with defense counsel's use of the phrase "inappropriately touched." RP 164. On direct examination, Linden did

not use that phrase, so her answer is technically accurate. RP 128. But she did not testify that her testimony on direct examination was a mistake. Rather, she couldn't remember at the moment what she had actually said. RP 164.

Further, this cross-examination testimony might never have taken place had defense counsel renewed the child hearsay objection when Linden testified on direct examination to using a leading question in eliciting HA's disclosure. The State's reliance on Linden's cross-examination answer does not speak to what would have happened if the objection had been renewed before Linden was cross-examined.

The State also argues Linden's trial testimony did not show HA had a motive to lie. BOR at 27. This is wrong, since Linden testified HA's hateful attitude was directed at Duenas in particular and the two could not get along. RP 138-39. This is classic bias evidence. The fact that Linden also testified the children loved Duenas does not contradict this testimony. RP 162. And even if it did, the existence of a contradiction is itself significant. If Linden gave inconsistent descriptions of the relationship, then that could be taken into account by the judge in determining whether the child hearsay was admissible. The judge would be given an opportunity to decide which version was accurate.

The State further argues HA's bad attitude corroborated her abuse and that other evidence showed she was reluctant to disclose. BOR at 27-28. The State, however, is not the finder of fact. The question is how the judge would have resolved such evidence had it been asked to decide a renewed child hearsay objection based on the contradictory testimony that came in during trial. As argued in the opening brief, there is a reasonable probability the trial court would have granted a renewed motion to exclude the child hearsay had such a motion been made. The State does not challenge Duenas's argument that if such a motion had been granted, there is a reasonable probability the outcome of the trial would have been different.

3. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DEPRIVED DUENAS OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

In the opening brief, Duenas argued the prosecutor committed multiple instances of misconduct. The State emphasizes there was no objection and asserts the issue is waived because any misconduct was curable by instruction. BOR at 31-42. In doing so, it views each instance of misconduct in isolation, bit by bit. That is not the proper legal analysis. The cumulative effect of misconduct must be taken into account. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Repeated instances of

misconduct must be considered as a whole because "the cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 707, 286 P.3d 673 (2012) (quoting State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011)). The State does not come to grips with this basic point. "[T]he failure to object will not prevent a reviewing court from protecting a defendant's constitutional right to a fair trial." State v. Walker, 182 Wn.2d 463, 477, 341 P.3d 976, cert. denied, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015).

The State asserts the prosecutor did not disparage defense counsel in closing argument in telling the jury "what he is accusing them of doing is absolutely egregious." BOR at 39-40. Given the State's insistence that Duenas's appellate counsel misunderstands the comment and takes it out of context, the statement and its context are reproduced in full here. This is how the prosecutor started his rebuttal argument:

> My opportunity to respond -- *as a defense attorney* in a case involving child sex abuse, the last thing you want to do is you want to overtly -- you don't want to overtly disparage the children. So *defense counsel attempts to walk this line* by saying, they're not bad kids. They're good people. But *let's soak in for a second what he's accusing them of doing*. He is accusing them, knowing full well that their mother got to leave the stresses of her job, got to come home and spend time with them, that she was in love with

> the defendant, that they were happy and set to be married. And *what he is accusing them of doing, is fabricating sexual assault allegations and carrying it through.* Walking into this courtroom, taking an oath to tell the truth and flat out lying and colluding to perpetrate this lie. *If that's what you're going to accuse them of, then call a spade a spade.* Don't then try to sit here and say, oh, they're good kids, you know, et cetera. I'm sorry, but *what he is accusing them of doing is absolutely egregious.* RP 423-24.

The prosecutor then went on to rebut the ways in which defense counsel had argued the children were not believable, starting with HA's anger at the world. RP 424.

From this, the State claims the prosecutor was arguing the act of lying and falsely bringing claims against an innocent person is egregious. BOR at 39. The State's interpretation of the record is clever but wholly unsustainable. The "he" in "what he is accusing them of doing" clearly refers to defense counsel. "Them" clearly refers to the children. The accusation — what counsel is accusing the children of doing — "is fabricating sexual assault allegations and carrying it through" and "flat out lying and colluding to perpetrate this lie." RP 423. There is no room for any other reasonable interpretation.

Prosecutorial statements that malign defense counsel are impermissible because they can damage a defendant's opportunity to present his case. State v. Lindsay, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). The prosecutor's argument is especially pernicious because it

seeks to align the jury against Duenas through his attorney: on the right side stand those who believe child accusers, on the wrong side stand those, like defense counsel, who accuse them of lying. The prosecutor accused defense counsel of doing something extremely bad. And what counsel was accused of doing coincides with Duenas's defense that he did not commit the abuse. The prosecutor's comment damaged Duenas's opportunity to put on a defense by casting the defense itself as morally corrupt. This argument, by itself, was flagrant misconduct.

Regarding the prosecutor's comment that defense counsel's argument was "misleading" (RP 430), the State maintains the reasoning and holding of State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) apply. BOR at 42. In Thorgerson, the prosecutor used the word "bogus" to describe the defense and argued that "[t]he entire defense is sl[e]ight of hand." Thorgerson, 172 Wn.2d at 450-51. The Supreme Court held the prosecutor committed misconduct by impugning defense counsel's integrity. Id. at 451-52. Thorgerson thus supports Duenas's argument that the prosecutor committed misconduct here as well. The State claims no prejudice accrued from the remark that counsel was misleading the jury (BOR at 42), but this one instance of misconduct cannot be viewed in isolation in determining the curability of the cumulative impact of misconduct. Glasmann, 175 Wn.2d at 707.

The State maintains the prosecutor's comment that the detail described by KL "should send some shivers down some of you" (RP 398) was okay based on State v. Curtiss, 161 Wn. App. 673, 701, 250 P.3d 496, review denied, 172 Wn.2d 1012, 259 P.3d 1109 (2011). BOR at 37. In Curtiss, the prosecutor's rhetorical question "Do you know in your gut—do you know in your heart that Renee Curtiss is guilty as an accomplice to murder" was not misconduct when embedded within a larger argument about urging the jury to reach a just verdict by searching for truth. Curtiss, 161 Wn. App. at 701-02. The Court of Appeals disagreed the comment was an appeal to emotion. Id. at 702.

The prosecutor's "shiver" comment in Duenas's case is qualitatively different than the comment in Curtiss. To "shiver" is to "undergo trembling (as from cold, fear or the application of a physical force)." Webster's Third New Int'l Dictionary 2098 (1993). The prosecutor in effect told the jury that the detail in KL's testimony should elicit an emotional response — a response of fear — and should be believed for this reason. The prosecutor invited the jury to emotionally react to the evidence. The State claims no prejudice accrued from the remark (BOR at 38), but this instance of misconduct must be viewed in relation to other misconduct and its cumulative impact. Glasmann, 175 Wn.2d at 707.

The State claims the prosecutor committed no misconduct when he theorized about what was going on inside Duenas's head, arguing it "did not rise to the level of misconduct" in State v. Pierce, 169 Wn. App. 533, 553, 280 P.3d 1158, review denied, 175 Wn.2d 1025, 291 P.3d 253 (2012). BOR at 35-37. The misconduct here was not as inflammatory as it was in Pierce, but it was still misconduct. Under Pierce, a prosecutor cannot speculate about a defendant's thought process during the commission of a crime. Pierce, 169 Wn. App. at 554. No evidence was presented of Duenas's mindset during the alleged incident. Duenas took the stand and denied the incident occurred. The State claims no prejudice accrued from the remark (BOR at 37), but this one instance of misconduct must be viewed in relation in to the cumulative impact of other misconduct in assessing curability. Glasmann, 175 Wn.2d at 707.

The State says the prosecutor's comment about a "good society" was proper because it merely acknowledged the heinous nature of the subject matter. BOR at 33. If the prosecutor had stopped at the "good society" remark, then the State's argument on appeal might arguably have some weight to it. But the prosecutor went on to argue about the need for the jury "to accept that this really did happen" and that sexual abuse of children "happens all the time." RP 386-87. Taking the additional remarks as a whole and in context, the prosecutor resorted to community

values and the need to believe the children and convict Duenas based on evidence outside the record. See State v. Thierry, 190 Wn. App. 680, 691, 360 P.3d 940 (2015) (improper for prosecutor to argue jury needed to convict in order to allow reliance on the testimony of victims of child sex abuse and to protect future victims of such abuse), review denied, 185 Wn.2d 1015, 368 P.3d 171 (2016).

The State cites cases where similar arguments were found to be curable by instruction. BOR at 33-34 (citing State v. Smiley, 195 Wn. App. 185, 379 P.3d 149, 154-55 (2016) (improper for prosecutor to argue State might as well give up prosecuting sex abuse cases if the victim's word was not enough for conviction), petition for review filed, No. 935408; State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (argument that "exhorts the jury to send a message to society about the general problem of child sexual abuse" qualifies as an improper emotional appeal), review denied, 114 Wn.2d 1011, 790 P.2d 169 (1990); State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993) (improper for prosecutor to reference to a general societal problem of concern for children and how the judicial system can be frightening to them), review denied, 124 Wn.2d 1018, 881 P.2d 254 (1994)).

In Smiley, the improper argument was deemed curable and waived for appeal in the absence of objection because defense counsel ran with

the prosecutor's theme in his own closing argument and "made it his own." Smiley, 379 P.3d at 156. No such dynamic is present in Duenas's case. Further, similar remarks have been found to be incurable in a given case. See, e.g., State v. Powell, 62 Wn. App. 914, 918-19, 816 P.2d 86 (1991) (argument warning jurors what would happen if kids not believed), review denied, 118 Wn.2d 1013, 824 P.2d 491 (1992). There is no hard and fast rule. And once again, this one instance of misconduct cannot be viewed in isolation in determining the curability of the cumulative impact of misconduct. Glasmann, 175 Wn.2d at 707.

The State does not respond to Duenas's alternative argument that defense counsel was ineffective in failing to object to the prosecutorial misconduct.

4. THE COMMUNITY CUSTODY CONDITION PROHIBITING DUENAS FROM ENTERING A RELATIONSHIP WITH ANYONE WHO HAS MINOR AGED CHILDREN IS UNCONSTITUTIONALLY VAGUE.

As a condition of community custody, the court ordered "do not enter into a relationship with anyone who has minor aged children residing in or visiting their home without the approval of the therapist and the CCO." CP 78. In the opening brief, Duenas argued this condition is unconstitutionally vague in violation of due process because it is

insufficiently definite to apprise him of prohibited conduct and does not prevent arbitrary enforcement.

Disagreeing, the State relies on State v. Kinzle, 181 Wn. App. 774, 326 P.3d 870 (2014), review denied, 181 Wn.2d 1019, 337 P.3d 325 (2014). BOR at 49. Kinzle did not decide the issue raised in Duenas's appeal and is therefore inapposite. In Kinzle, the court ordered the defendant not to "date women nor form relationships with families who have minor children, as directed by the supervising Community Corrections Officer." Kinzle, 181 Wn. App. at 785. Kinzle argued this condition was "overbroad, vague, and unnecessary" in a passing manner but made no due process argument.[1] The Court of Appeals upheld the condition as reasonably crime-related and necessary to protect the public. Id. The Court of Appeals did not decide whether the condition violated due process on vagueness grounds. Cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue. In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

United States v. Reeves, 591 F.3d 77, 79-81 (2d Cir. 2010) squarely decided the due process issue in relation to a similar condition.

[1] See Kinzle's brief at 37-38 (available at http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coaBriefs.Div1Home&courtId=A01).

The Court of Appeals adopted the Reeves court's reasoning in the unpublished decision of State v. Dickerson, noted at 194 Wn. App. 1014, 2016 WL 3126480 (2016). In Dickerson, the trial court imposed this community custody condition: "That you do not enter a romantic relationship without the prior approval of the [community corrections officer] and Therapist." Dickerson, 2016 WL 3126480 at *1. Relying on Reeves, the Court of Appeals held the condition was unconstitutionally vague because "it is not clear which relationships will require the permission of both the community custody corrections officer and therapist." Id. at *5. Further, "[t]he condition is open to arbitrary enforcement by community custody officers and therapists with different ideas about the point at which a relationship becomes romantic." Id.

The condition in Duenas's case suffers from the same kind of defect but is even less clear than the conditions struck down in Dickerson and Reeves. The condition in those two cases at least narrowed the type of relationship at issue to "romantic" ones. The condition in Duenas' case, in banning any kind of relationship with those who have minor-aged children, is more expansive and invites even more arbitrary enforcement in regard to what qualifies as a "relationship." The condition does not meet the requirements of due process and should be stricken.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Duenas requests reversal of the convictions. If this Court declines to reverse, the conviction for count 2 should be vacated, the sentence for count 4 should be reduced, and the challenged conditions of community custody should be stricken or clarified.

DATED this 15th day of November 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC

November 15, 2016 - 4:12 PM

Transmittal Letter

Document Uploaded: 7-481197-Reply Brief.pdf

Case Name: Jonathan Duenas
Court of Appeals Case Number: 48119-7

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

copy sent to: Jonathan Duenas, 384687 Clallam Bay Corrections Center 1830 Eagle Crest Way Clallam Bay, WA 98326

Sender Name: John P Sloane - Email: sloanej@nwattorney.net

A copy of this document has been emailed to the following addresses:

CntyPA.GeneralDelivery@clark.wa.gov
grannisc@nwattorney.net